

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

FEARGHAL MCCARTHY; FEARGHAL MCCARTHY and
CASTLETHORNE CAPITAL LLC, as nominal plaintiffs on
behalf of VENIA RE HOLDINGS LLC, VENIA
DEVELOPMENT LLC, VENIA ASSET MANAGEMENT LLC,
and VENIA HOLDINGS, INC.; and VENIA RE HOLDINGS
LLC, VENIA DEVELOPMENT LLC, and VENIA ASSET
MANAGEMENT LLC, by and through its manager, Fearghal
McCarthy,

Plaintiffs/Appellants,

v.

KEVIN DeFORD, et al,

Defendants,

and

VENIA RE HOLDINGS LLC, et al,

Nominal Defendants,

and

WEST PARK PARTNERS LLC,

Defendant/Respondent.

Appeal from the Superior Court of Clark County
Case No. 12-2-03111-1

APPELLANTS' REPLY BRIEF

APPELLANTS' REPLY BRIEF - i

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I. SUMMARY OF ARGUMENT

The trial court erroneously believed that prior legal ownership, not equitable ownership, of real property is required to prevail in an action to quiet title. Based on this belief, the trial court cancelled a lis pendens filed by Appellants on real property located at 610 Esther Street, Vancouver, Washington 98660 (the Property”). But, an alleged equitable interest in real property is sufficient for a plaintiff to advance a quiet title action and to file a lis pendens. RCW 7.28.010. RCW 4.28.320. Moreover, for well over a hundred years, Washington Courts have held that the imposition of a constructive trust on real property provides legal grounds to quiet title and to file a lis pendens. See *Rozell v. Vansyckle*, 11 Wash. 79, 83, 39 Pac. 270 (1895), (rescission of deeds to real property upon a finding of a constructive trust); *Parker v. Burwell*, 6g Wn. 386, 125 P.151 (1912), (affirmation of filing of a lis pendens in a constructive trust action).

The issue in this appeal is whether breaches of fiduciary duties owed and breaches of contract obligations by defendants Copenhaver and DeFord (the “Fiduciaries”) to Venia RE Holdings LLC (“VREH”) due to their diversion of VREH’s asserted ownership rights to the Property, provide legal causation for the equitable remedy of quieting title under either equitable ownership or constructive trust theory. Washington courts have previously answered this question with an affirmative “yes”.

Washington courts have consistently held that both the quiet title and lis pendens statutes should be interpreted broadly. See *Symington v. Hudson*, 40 Wn.2d 331, 336, 243 P.2d 484 (1952), (a quiet title action is

as broad as claiming any estate, right, title, interest in, claim or lien upon real property); *Schwab v. City of Seattle*, 64 Wn. App. 742, 750, 826 P.2d 1089 (1992), (“the lis pendens statute is best served by a broad interpretation of its language”); RCW 7.28.010; RCW 4.28.320. West Park’s attempt to narrow Washington courts’ interpretations of these two statutes, so as to exclude all equitable interest claims arising from breaches of fiduciary duties by managers and controlling shareholders of closely-held business entities, should be rejected.

The Fiduciaries breached fiduciary duties and the provisions of the VREH limited liability company Agreement (the “LLC Agreement”) by diverting work product, cash, confidential information, project financing, contract rights, and business opportunities from VREH for their own personal gain to the detriment of VREH and its the members. CP 82.

The specific tort under review in this appeal is the diversion of the contract rights to acquire the Property that were the work product of VREH’s pursuit of that business opportunity. But for the Fiduciaries’ breach of their duties, VREH would be the legal title holder to the Property. Defendant Copenhagen executed the purchase contract to acquire the Property (the “Purchase Contract”) in the name of a straw buyer alter-ego, Acorn Acquisitions LLC. The Fiduciaries then formed a new entity West Park Partners LLC (“West Park”) and caused the contract rights to acquire the Property to be assigned to West Park.

Based upon the Fiduciaries’ duties of loyalty and good faith owed to VREH, and their contractual obligations not to partition legal title to the

Property, VREH asserts equitable ownership of the Property. An adjudication of whether VREH's equitable ownership is superior to West Park's holding of legal title is prayed for in Appellants' Second Amended Complaint. But no adjudication of this issue took place. Reversal and remand is necessary to facilitate this adjudication.

II. ARGUMENT

A. Issues presented for Review

The following issues are pertinent to the Court's review:

1. Is reversal of dismissal of the quiet title claim warranted, given that the Second Amended Complaint presents no insuperable bar to relief?
2. Do the factual allegations that Copenhaver and DeFord breached their fiduciary duties by diverting contract rights that were the work product of VREH constitute a valid basis for this quiet title action?
3. Should the trial court's dismissal of this quiet title action be reversed when West Park submitted no evidence to contradict the evidentiary facts submitted into the record by the Appellants?
4. Do Washington courts permit title to real property to be quieted based upon either an equitable ownership or constructive trust theory?
5. Are Appellants entitled to re-file their Lis Pendens if the trial court's dismissal of the quiet title action is reversed?
6. Are Appellants entitled to their attorney's fees because this is a

derivative action that seeks to preserve a common asset in which defendants Copenhaver and DeFord will have an ownership interest?

B. Reversal of dismissal of Appellants' quiet title claim is warranted because the Second Amended Complaint presents no insuperable bar to relief.

As an initial matter, West Park is mistaken in that the trial court did in fact enter an Order as a final judgment dismissing Appellants' claim to quiet title to the Property set forth in the Second Amended Complaint (the "Complaint"). CP 311, ¶7-8. West Park contended that the Complaint failed to state a claim to quiet title. As a result, West Park's motion to cancel the Lis Pendens was a de-facto motion to dismiss the quiet title claim based upon the pleadings, resulting in a final judgment that is now under this Court's review.

West Park devotes much of its briefing to arguing that the Appellants, in their Complaint, "failed to allege or aver facts sufficient to support a claim to quiet title." See Respondent's Brief, pgs 9-20. But this is not the standard for dismissal based on the pleadings, pursuant to CR 12(b)(b). "A motion to dismiss is granted 'sparingly and with care' and, as a practical matter, 'only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). See Appellants' Opening Brief, ¶IV.C, pgs 13-16.

West Park fails to identify any allegation whatsoever on the face of the Complaint that presents an insuperable bar to the relief requested by

the Appellants to quiet title to the Property under either a constructive trust theory or equitable ownership theory. For this reason alone, reversal of dismissal of this quiet title action is warranted and remand should be ordered for adjudication of the parties' competing ownership claims.

By executing the Purchase Contract in his alter-ego's name, Acorn Acquisitions LLC, and not in the name of VREH, defendant Copenhaver deprived VREH of legal title to the Property. Prior legal ownership is not a prerequisite for a quiet title claim. Appellants Opening Brief, ¶IV.D. pg 16-17. West Park overlooks that VREH is asserting its quiet title and constructive trust claims based upon its prior *equitable* interests. The contract rights to purchase the Property were the work product of VREH.

A quiet title action is an equitable remedy. *Kobza v. Tripp*, 105 Wn. App. 90, 92, 18 P.3d 621 (2001). A quiet title action resolves competing claims of ownership. *Id.* at 95. The superior title whether legal or equitable must prevail." *Finch v. Matthews*, 74 Wn.2d 161, 166, 443 P.2d 833 (1968). Thus, Washington Courts have rejected West Park's notion that prior legal ownership is a prerequisite for VREH's quiet title claim, holding instead that an equitable interest in real property is sufficient to bring a quiet title claim. In the Complaint, VREH has propounded prior equitable ownership of the Property because the contract rights to acquire the Property was work product that belonged to VREH and the work product of VREH's pursuit of the business opportunity to acquire the Property. Whether VREH's equitable ownership or West Park's legal title

is superior requires adjudication. Because no adjudication has taken place, reversal of dismissal and remand to the trial court is warranted.

VREH's equitable ownership is rooted upon two separate grounds; either one sufficient for VREH to sustain a quiet title claim. Firstly, VREH asserts equitable ownership of the Property based upon the duties of loyalty and good faith owed by the Fiduciaries' to VREH and its members as: i) managers of VREH and the other Venia entities (collectively "Venia"); ii) as officers and paid employees of VREH and Venia; and iii) as controlling shareholders of VREH and Venia, all closely-held limited liability companies. The Fiduciaries breached these duties by diverting work product that belonged to VREH.

Secondly, VREH asserts equitable ownership of the Property based upon defendant Copenhaver's breach of the provisions of the VREH limited liability company Agreement (the "LLC Agreement") requiring "*legal title to all Company Property to be held in the name of the Company*" and that no member, successor or assign of a member "*shall have any right, title or interest to Company Property...or the right to partition Company Property.*" CP 198. ¶4.9. Thus, VREH's quiet title claim and equitable ownership to the Property rests squarely upon the strength of its own equitable interests and not upon the weakness of West Park's legal title. Simply put, VREH's equitable ownership is firmly founded on fact that the contract rights were work product that belonged to Venia; and Venia would be the legal owner of the Property but for its

Fiduciaries' breaches of duties, not because of weaknesses in legal title held by West Park.

Even so, it is not insignificant that the Fiduciaries formed West Park after the Purchase Contract was executed and while they were the fiduciary managers of VREH. See ¶D, pg 16, *infra*. The Fiduciaries are the managers of West Park and the diversion of the Property was orchestrated by Copenhaver using his no-asset alter-ego entity, Acorn Acquisitions LLC, as a straw buyer to obfuscate execution of the Purchase Contract and its subsequent diversion to West Park. CP 192-193; CP 125, 131.

If any set of facts consistent with the Complaint entitles Appellants to relief to quiet title, including hypothetical facts not in the formal record, then the quiet title claim should not be dismissed. See *Rodriguez v. Perez*, 99 Wn. App. 439, 442, 994 P.2d 874 (2000), (citing, *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). For the purposes of this analysis, the facts alleged in the Complaint are presumed to be true. *Id.*, citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

Facts stated in the Complaint together with reasonable inferences therein that support Appellants' quiet title claim include: VREH is in the business of acquiring and developing real estate; acquisition of the Property was a business opportunity within VREH's line of business; defendants Copenhaver and DeFord owed fiduciary duties of loyalty, good faith and care to VREH and its members; the Fiduciaries formed multiple entities to conceal and convert business opportunities belonging to VREH; the

contract rights to purchase the Property were the work product of VREH derived from its pursuit of that business opportunity; Acorn Acquisitions LLC is an alter-ego of Copenhaver with no assets or business operations; Copenhaver diverted the contract rights to acquire the Property by causing his no asset alter-ego, Acorn Acquisitions LLC, to execute the Purchase Contract instead of VREH; the Fiduciaries formed West Park and then assigned the Purchase Contract to West Park to deprive VREH of legal ownership of the Property; the Fiduciaries diverted cash and project financing from VREH to purchase the Property. CP 76-86. (see also Appellants' Opening Brief, ¶III.B.a, pgs 6-8 and ¶IV.C, pgs 14-15.). But for the Fiduciaries' diversion of the contract rights to purchase the Property, VREH would be the legal owner of the Property with rights of possession. All these facts are consistent with those stated in the Complaint and are presumed to be true for purposes of deciding whether dismissal of Appellant's quiet title claim was in error. Thus, dismissal of Appellant's quiet title claim based on the pleadings was improper because the above set of facts, consistent with the Complaint, justifies recovery. See *Hoffer v. State*, 110 Wn.2d at 420.

West Park's contention that VREH cannot pursue a quiet title claim because VREH did not hold prior legal title is illogical. Copenhaver's failure to list VREH as the buyer on the Purchase Contract constitutes the very injury for which VREH seeks equitable relief to quiet title. Put another way, VREH's injury of being deprived of legal title to the Property by the Fiduciaries' breaches of duty cannot preclude the very relief

sought to cure the same injury, which is the equitable remedy to quiet title. It is for this reason that “[t]his state is aligned with those jurisdictions which permit one who has only an equitable title to land to maintain an action to quiet title, even though out of possession; [and] the superior title whether legal or equitable must prevail.” *Finch v. Matthews*, 74 Wn.2d at 166.

West Park suggests Appellants should pursue a claim for damages rather than pursuing equitable relief to quiet title; but cites no authority for this proposition. Respondent’s Brief, page 12. Appellants have standing to assert a quiet title claim. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001), (“Standing follows the right to assert an equitable claim”); *Smith v. Monson*, 157 Wn. App. 443, 445, 236 P. 3d 991 (2010), (“Standing to assert a claim in equity resides in the party entitled to equitable relief; it is not dependent on the legal relationship of those parties.). Further, Washington courts have held that equitable relief is appropriate for actions that pertain to real property. This is because the unique character of real property title can be of greater value than its monetary value. *Edmonson v. Popchoi*, 172 Wn.2d 272, 279-280, 256 P.3d 1223 (2011). See also *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 222, 242 P.3d 1 (2010) (“[B]ecause land is unique and difficult to value, specific performance is often the only adequate remedy for a breach of contract regarding real property.”); *Chelan County v. Wilson*, 49 Wn. App. 628, 744 P.2d 1106 (1987), (“Real estate contracts are clearly transfers of an equitable interest in property.”)

West Park contends the Complaint is deficient because Appellants did not allege that “the Venia entities have contributed one penny to the purchase of the property”. West Park forgets that the Complaint alleges the Fiduciaries diverted cash, project financing and investor opportunities from VREH to purchase the Property.¹ A quiet title action “requires that all of the parties' rights be determined...equitable rights as well as legal rights are adjudicated.” *Witzel v. Tena*, 48 Wn.2d 628, 631, 295 P.2d 1115 (1956). The Complaint’s prayer for equitable relief not only seeks to quiet title to the Property, but also seeks the imposition of a constructive trust on the *project financing* used to purchase the Property. CP 86 ¶3. No valid reason precludes the Court from exercising its equitable jurisdiction.

"Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought." *Pacific Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); CR 8(a). West Park’s minimization of the allegations in the Complaint to contend they are insufficient does not negate this principle. The Complaint does not assert that VREH only gave cursory consideration to acquiring the Property, as West Park suggests. VREH did more than give cursory consideration to the Property. The contract rights were the work product of VREH’s pursuit of the business opportunity to acquire the Property; and VREH would be the legal owner but for the Fiduciaries’ breach of duties. Notably, West Park does not dispute that Venia company

¹ Contrary to West Park’s assertion, the Complaint states these facts. CP 82, lines 6-7.

funds were used to pay defendant Ickert for assisting VREH with pursuit of the opportunity, and Ickert is also a manager-member of West Park. CP 5, CP 192-193. This disbursement is one more fact supporting the allegations in the Complaint. While West Park is free to dispute these facts, these factual determinations are within the province of a jury and do not create an insuperable bar to warrant dismissal of the quiet title claim stated in the Complaint.

In summary, West Park fails to show any allegation on the face of the complaint that is an insuperable bar to an adjudication of the quiet title relief requested by Appellants. Conversely, Appellants propound a set of facts consistent with the Complaint that justifies recovery by quieting title. For these reasons, the trial court's dismissal of Appellant's quiet title claim based upon West Park's asserted insufficiency of the pleadings is error.

C. The allegation that Copenhaver and DeFord breached fiduciary duties is sufficient to require adjudication of Appellant's quiet title claims.

A case with analogous facts to this case is a North Carolina case. In *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 824, 561 S.E.2d 578 (2002), the plaintiffs sued an alleged business partner who purchased a commercial property in his own name instead of purchasing on behalf of the partnership. Plaintiffs sought a constructive trust and recorded a lis pendens against the property. The trial court declined to cancel the lis pendens. The Court of Appeals affirmed the trial court, holding that an

oral partnership agreement was sufficient to create a trust relationship between the parties, entitling the plaintiffs to file a lis pendens and to pursue a quieting title on a constructive trust theory based upon the defendants breaches of duty to the partnership.

Washington courts have consistently held that a breach of fiduciary duties provides legal grounds to quiet title to real property, under either an equitable ownership or constructive trust theory. See Appellants' Opening Brief, ¶IV.F pgs 20-24; ¶IV.H pgs 25-30. West Park fails to distinguish the cases cited by Appellants on breach of fiduciary duties.

In *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949 (1987), a general partner in a partnership breached his fiduciary duty by conveying land to a third party without any benefit accruing to the partnership. Similarly, Copenhaver, the Chief Executive Officer and manager of VREH conveyed the contractual ownership rights that equitably belonged to VREH without any benefit accruing to VREH.

In *Westerbeck v. Cannon*, 5 Wn.2d 106, 104 P.2d 918 (1940), a real estate agent breached his fiduciary duty by concealing his true interest in real property resulting in rescission of the contract. Similarly, the Fiduciaries here failed to disclose to VREH and its members that they were diverting contract rights to the Property, using a nominee alter-ego entity as the straw-buyer to conceal their wrongdoing.

In *Moon v. Phipps*, 67 Wn.2d 948, 955, 411 P.2d157 (1966) the Court affirmed the legal principle that “a breach of the fiduciary duty alone would be sufficient to warrant rescission and cancellation of the

option by which [the defendant] obtained legal dominion over the realty." Similarly, the Fiduciaries here "obtained legal dominion" over the Property by breaching their fiduciary duties.

In re Marriage of Lutz, 74 Wn. App. 356, 873 P.2d 566 (1994), a husband conveyed property to a related party so as to deprive his wife of her equitable interest. The court found the husband owed fiduciary duties to the wife and quieted title in order to preserve the wife's equitable interest, even though the wife never held *legal title* to the property. Similarly, here the Fiduciaries conveyed legal ownership rights to the Property to a related party so as to deprive other members of VREH of their equitable interest.

In *White v. White*, 33 Wn. App. 364, 655 P.2d 1173 (1982), a mother sought to quiet title to property transferred to her son. The Appeal Court reversed the trial court holding that because the family's personal and business matters were intertwined, the son had a fiduciary relationship and breached fiduciary duties requiring the conveyance be rescinded and title quieted to the mother. Similarly, the Fiduciaries here improperly conveyed ownership rights to the Property in breach of their fiduciary duties.

In *Moss v. Vadman*, 77 Wn.2d 396, 397, 463 P.2d 159 (1969), the determinative issue on quieting title on a constructive trust theory was whether there was a breach of a fiduciary relationship. Similarly, that is the determinative issue in this action.

Despite the factual diversity of all these cases, they share a single common principle consistently applied by Washington Courts. A proven

breach of fiduciary duty is grounds for quieting title. Appellants allege in their Complaint that the Fiduciaries breached their fiduciary duties. That allegation alone is warrant an adjudication of Appellants' quiet title claim.

D. VREH's equitable ownership of the contract rights to acquire the Property is supported by undisputed evidence in the record.

The trial court cancelled the lis pendens based upon its conclusion that the Complaint did not state facts sufficient to state a claim to quiet title. Resp. Brief, pg 9. Notwithstanding this, both parties submitted documentary evidence into the record pertaining to West Park's motion to cancel the Lis Pendens and other motions.

Four declarations with exhibits support the factual assertions made by the Appellants in the Complaint.² West Park submitted one declaration that did not dispute the facts propounded by the Appellants. CP 89-95.

When Copenhaver, DeFord and McCarthy formed the Venia entities to develop real estate, they agreed to "jointly manage and operate the business." CP 124, CP 7. As business partners, members and co-managers of the Venia entities, they agreed that all new business opportunities would be jointly pursued via the Venia LLC's and that no one would compete against the Venia LLC's. CP 124, ¶ 4. This was because the parties did not want any conflicts of interest arising from the parties competing with each other or competing with the Venia LLC's. Id.

² CP 1-61; CP 67-75; CP 122-208;CP 261-266;

The Property was under active consideration for acquisition and development by the Venia LLC's and was one of several properties in close proximity being actively pursued. CP 125, ¶9. CP 264-5, ¶12. The named buyer on the Purchase Contract should have been one of the Venia LLC's. CP 125, ¶10. Copenhaver, DeFord and McCarthy took salaries from Venia; and Venia company funds were also paid to defendant Ickert who is a member-manager of West Park. CP 264, ¶ 11, CP 5, CP 193. The major assets of the Venia entities were represented by its work-product vis-a-vis the business opportunities that Copenhaver, DeFord and McCarthy were pursuing. CP 264, ¶11. The business opportunity to acquire the Property was work product that belonged to the Venia entities. CP 265, ¶12. But for the improper diversion of this work product, whereby Copenhaver and DeFord breached their fiduciary duties, VREH would be the legal owner of the Property. CP 265, ¶12.

Neither West Park nor any other defendant submitted any evidence to contradict the above facts entered into evidence by Appellants. Instead, West Park attempts to characterize Venia's active consideration and pursuit of the Property as something cursory rather than as a substantive asset of VREH as stated in the McCarthy Declaration. If dismissal of Appellants quiet title claim is to be decided based upon the evidence in the record, akin to a summary judgment motion rather than on the pleadings, all facts and reasonable inferences are considered in the light most favorable to the Appellants as the non-moving party. See Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Viewing

the facts and reasonable inferences in the light most favorable to Appellants, the contract rights to purchase the Property was work product belonging to VREH resulting from its pursuit of the business opportunity to acquire the Property; the Venia entities expended funds to pursue that business opportunity by paying the Fiduciaries' salaries and by paying consulting fees to defendant Ickert; equitable ownership of the contract rights to purchase the Property rightfully belonged to VREH; and but for the Fiduciaries' diversion of those contract rights, VREH would be the legal owner of the Property with full rights of possession.

West Park improperly states in its Statement of Facts that "Copenhaver and DeFord continued to develop real estate with each other, but without McCarthy [and] the development at issue is an office building at 610 Esther Street"; "McCarthy, Copenhaver and DeFord were once business partners in various Venia entities." Resp. Brief pg 5, pg 8. These statements are not cited to evidence in the record, are misleading and should be stricken. The suggestion being made to the Court by these unsupported statements is that the Fiduciaries' acquisition and subsequent conveyance of the Property to West Park had nothing to do with the business partnership of McCarthy, Copenhaver and DeFord organized through the Venia entities. The evidence in the record is to the contrary.

The lawsuit was initiated in August 2012 after the Fiduciaries opened up company bank accounts over which they had sole managerial control, in breach of the parties' agreement. CP 4. ¶ 7; CP 8. Appellant McCarthy feared that moneys and business opportunities would be

diverted. CP 6, CP 124. The Purchase Contract was executed on October 13, 2013 and assigned to West Park on January 15, 2014. CP 131. CP 187. Eight months later after the Purchase Contract was executed, in June 2014, the Fiduciaries submitted letters of resignation as managers of the Venia entities. CP 263. ¶3. Despite these letters of resignation, the Fiduciaries continued to exercise exclusive managerial control over the bank accounts and assets of the Venia entities - and had exclusive managerial control of these assets until October 22, 2014. CP 264, ¶8.

Nothing in the record evidences the Fiduciaries' resignation as *members* of the Venia entities; in fact McCarthy, Copenhaver and DeFord continue to be joint owners and partners in these entities. In summary, the Purchase Contract was executed by the Fiduciaries eight months prior to the submission of their resignation letters as managers of the Venia entities; and the Fiduciaries still hold membership interests in the Venia entities. It is therefore misleading for West Park to suggest the Property was acquired outside the scope of the Fiduciaries' partnership within the Venia entities. The Purchase Contract was executed and then conveyed to West Park while Copenhaver and DeFord were managers of VREH who owed fiduciary duties of loyalty and utmost good faith to VREH and its members. Moreover, should Appellants prevail in its quiet title action, the Fiduciaries will continue to be owners of the Property through their membership interests in VREH.

E. Washington courts have a long history of recognizing constructive trusts theory as a basis to quiet title to real property and to file a lis pendens.

It is true that some states limit a plaintiffs' ability to record a lis pendens under constructive trust theory, specifically where a plaintiff's claim is based on tracing of funds. But the general rule in American jurisprudence is that constructive trusts allow a plaintiff to recover property and quiet title. The object of the constructive trust is to restore to the rightful owner the property wrongfully withheld by the defendant. *Fix v. Fix*, 847 S.W.2d 762, 765[1] (Mo. 1993).

West Park wrongly contends that "no reported decision in Washington addresses the question of whether the imposition of a constructive trust to a parcel of real property is sufficient to record a lis pendens." See Resp. Brief, pg 20. Washington Courts have a long history of quieting title to real property under constructive theory. See *Rozell v. Vansyckle*, 11 Wash. 79, 83, 39 Pac. 270 (1895), (rescission of deeds to real property upon a finding of a constructive trust); *Parker v. Burwell*, 6g Wn. 386, 125 P.151 (1912), (affirmation of filing of a lis pendens in a constructive trust action); *In re Marriage of Lutz*, 74 Wn. App. 356, (quiet title relief granted under constructive trust theory); *Bangasser & Associates, Inc. v. Hedges*, 58 Wn.2d 514, 516-518, 364 P.2d 237 (1961), (quiet title relief granted under constructive trust theory; Accord: *Kausky v. Kosten*, 27 Wn.2d 721, 179 P.2d 950 (1947), *Nicolai v. Desilets*, 185 Wash. 435, 55 P.2d 604 (1936); *Seventh Elect Church in Israel v. First Seattle Dexter*

Horton Nat. Bank, 162 Wash. 437, 299 Pac. 359 (1931); *Pacheco v. Mello*, 139 Wash. 566, 247 Pac. 927 (1926)). In Washington, the imposition of a constructive trust on real property does “affect title to real property” because the title-holder is bound to convey the subject property to another. *Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511 (1971).

The principle controlling the application of constructive trusts to real property is set forth in *Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. at 440.

Where, for any reason, ***the legal title to property*** is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and ***compel restoration***, where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means, gains something for himself which, in equity and good conscience, he should not be permitted to hold.”

In *Scymanski v. Dufault*, 80 Wn.2d 77, 89, 491 P.2d 1050 (1971), the Court relied on *Seventh Elect Church* to hold that a constructive trust was the appropriate remedy to convey to the plaintiff an asset the plaintiff had under contract to purchase, but that was sold to a third party who interfered with the plaintiff's business relationship with the seller.

In summary, multiple Washington cases hold that the purpose of a constructive trust is convey legal title or legal ownership of property to a plaintiff. Constructive trust theory has long been recognized in Washington as a basis to quiet title to real property. For this reason, a party may file a *lis pendens* in a constructive trust action. See *Parker v. Burwell*, 6g Wn.

386, 125 P.151 (1912). When a constructive trust action seeks to quiet title to real property, as is the case here, it necessarily is an action “affecting title to real property” for which a lis pendens may be filed. RCW 4.28.320.

West Park cites a California case to contend that a constructive trust remedy does not entitle a plaintiff to file a lis pendens. Resp. Brief, pg 22, citing *BGJ Associates v. Superior Court*, 89 Cal.Rptr.2d 693, 75 Cal.App.4th 952 (1999). But this case is inapposite because California law as to lis pendens is vastly different from Washington law. In California, “courts have long recognized that...the recording of a lis pendens place[s] a cloud upon title of real property.” *Id.* at 704. As West Park explains, in California “a lis pendens is like a prejudgment writ of attachment” as it “tends to *create a right* substantially similar to an ex-parte prejudgment writ of attachment.” Resp. Brief, pg 25-26.

In sharp contrast to California law, “[i]n Washington, lis pendens is procedural only; it does not create substantive rights in the person recording the notice.” *Beers v. Ross*, 137 Wn. App. 566, 575, 154 P.3d 277 (2007). See, *R.O.I, Inc. v. Anderson*, 50 Wn. App. 459, 748 P.2d 1136, (1988), (a “lis pendens has no effect on the substantive rights of the parties”); *Kritzer v. Collier*, 28 Wn.2d 356 (1947), (“the notice of lis pendens...has no practical effect on the substantive rights of the respective parties.”). Thus, a lis pendens in Washington is not akin to a prejudgment writ of attachment and does not cloud title, unlike in California.

West Park cites no authority to support the notion that, in Washington, a plaintiff seeking relief to quiet title based upon

constructive trust theory is not equally entitled to file a lis pendens in the same manner as a plaintiff seeking relief to quiet title based upon another theory, such as adverse possession. The Lis Pendens statute, RCW 4.28.320, does not discriminate by allowing a lis pendens for a quiet title action under one theory, but disallowing a lis pendens for a quiet title action under another theory; because in Washington, it does not matter whether a plaintiff seeks to quiet title under constructive trust theory, adverse possession theory, fraudulent conveyance theory, trespass, or some other theory.

In *BGJ Associates v. Superior Court*, 89 Cal.Rptr.2d 693, the Court cancelled the lis pendens because the plaintiffs primarily sought money damages, not equitable relief. *Id.*, 705-706. The plaintiffs were seeking a constructive trust, in part, as a way to secure the subject property as collateral for a money damages award. For the other out-of state cases that West Park cites, the lis pendens were similarly disallowed because the plaintiffs sought a constructive trust primarily to secure money damages. Resp. Brief, pg 27-28. But that is not the case here where the relief sought in the Complaint for the Fiduciaries' wrongful diversion of legal ownership of the Property is equitable relief to quiet title under a constructive trust theory, not money damages.³ Because Appellants seek

³ The Second Amended Complaint alleges the Fiduciaries “formed multiple entities to conceal and convert assets and business opportunities” belonging to the Venia entities. CP 85. As a result, prior to discovery, Appellants did not know which assets had been diverted by the Fiduciaries. After discovering the contract rights to purchase the

to impose a constructive trust for the sole purpose of quieting title to the Property, a lis pendens notice is permitted.

“The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.” 76 Am.Jur.2d, Trusts, § 183 (2007), citing *Anderson v. Bellino*, 265 Neb. 577 658 N.W.2d (2003). In *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, *supra*, misappropriation of a corporate opportunity was sufficient for plaintiffs to file a lis pendens on a constructive trust theory. See also *Polk v. Schwartz*, 166 N.J. Super. 292, 298, 399 A.2d 1001 (N.J. App. Div. 1979), (“There is no doubt that an action to impress a constructive trust on realty affects title to that property, so that a notice of Lis pendens may be filed under a statute such as ours.”). While a minority of jurisdictions, such as California and Nevada, limit a plaintiffs’ ability to record a lis pendens, that is not the case in Washington where “the purpose of the lis pendens statute is best served by a broad interpretation of its language.” *Schwab v. City of Seattle*, 64 Wn. App at 750.

Here, Appellants allege that the Fiduciaries misappropriated assets belonging to VREH consisting of cash, project financing, and equitable

Property had been diverted, Appellants filed the Second Amended Complaint seeking specific relief to quiet title to the Property together with damages for the Fiduciaries other tortious acts alleged in the Complaint; for example, diversion of cash; unauthorized disbursement of funds; failure to repay personal loans made by the Venia LLCs, etc. CP 82-83; Appellants Opening Brief, pg 14 n.2.

ownership of the contract rights to purchase the Property that was VREH's work product.

West Park fails to cite to any case in Washington where a proven breach of fiduciary duty resulting in the misappropriation of real property did not result in the Court granting the equitable remedy of quieting title under either an equitable ownership theory or constructive trust theory. Instead, West Park asks the Court to overturn Washington law holding that the quiet title and lis pendens statutes be interpreted broadly; and to overturn well established Washington law holding that the filing of a lis pendens has no effect on the substantive rights of the parties and is not akin to a prejudgment writ of attachment.

F. Appellants' Motion to Stay was not moot.

West Park recorded a Cancellation of the Lis Pendens on September 29, 2014, just three days following entry of the order cancelling the lis pendens. Resp. Brief, pg 32. This was a violation of the 10-day automatic stay set forth in CR 62(a). Regardless, Appellants request for stay was not moot because Appellants would have been at liberty to re-file the lis pendens notice if the stay had been granted.

G. Appellants are entitled to their attorney's fees and costs.

Because this action affects title to real property, West Park is not entitled to attorney's fees pursuant to RCW 4.28.328(2). West Park cites no authority to explain why RCW 25.15.125 and RCW 25.15.155 should not be respected and why Appellant McCarthy should be held liable when he filed the lis pendens in his capacity as a manager of the Venia entities.

Nor does West Park cite any authority to contradict the cases cited by Appellants in their Opening Brief where Washington courts have held attorney fees are recoverable by a Plaintiff where (1) the plaintiff is injured by a breach of fiduciary duties; (2) the plaintiffs actions seek to create or preserve a common fund such as a derivative lawsuit; and (3) reimbursement of attorneys fees is favored in derivative lawsuits such as here. Appellants' Brief, ¶IV.N, pgs 38-40.

III. CONCLUSION

It is well established in Washington that a breach of fiduciary duty establishes solid grounds to pursue a quiet title action. When a business opportunity or contract rights are misappropriated, a constructive trust is the appropriate equitable remedy to convey legal title to the misappropriated asset back to a plaintiff. When that asset affects title to real property, such as the misappropriation of contract rights to real property here, a plaintiff may quiet title to the subject property under constructive trust theory. In such an action, a plaintiff may also file a lis pendens.

West Park fails to show any allegation on the face of the Complaint that presents an insuperable bar to relief. Nor did West Park submit any evidence into the record to contradict the factual evidence submitted by the Appellants. Instead, West Park requests this Court to ignore well-established Washington law in favor out the out-of-state laws of minority jurisdictions interpreting their own states' lis pendens statutes narrowly.

Appellants are entitled to an adjudication of whether their equitable ownership of the Property is superior to the legal title held by West Park.

The tortious Fiduciaries are beneficiaries of this derivative action as they hold ownership interests in the Appellant Venia entities.

The Court is requested to reverse the trial court, remand for adjudication and permit the Appellants to re-file the notice of lis pendens.

RESPECTFULLY SUBMITTED ON THIS 9th day of October, 2015.

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I hereby certify that the foregoing APPELLANTS' REPLY BRIEF was served on:

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DATED this 9th day of October, 2015.

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Appellants' Reply Brief

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